EDITOR'S NOTE

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NO. 85-5776

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

WILLIAM BRACY,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Arizona.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

WILLIAM BRACY
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Petitioner, pro se

...STIONS PRESENTED FOR REVIEW

A.

Whether petitioner's constitutional rights were abridged by the prosecution's misconduct involving intentional prosecutorial nondisclosure of evidence and misconduct exclusive of nondisclosure of evidence?

B.

Whether petitioner's identification and the circumstances surrounding it failed to comport with due process requirements?

C.

Whether petitioner's Sixth Amendment right to confrontation was violated when his attorney was denied the right to cross-examine a prosecution witness about information relevant to impeachment of that witness?

D.

Whether petitioner was denied a fair trial by the trial court's admission of gruesome and highly inflammatory photographs which prejudiced the jury against him?

E.

Whether petitioner was denied due process of law when the prosecutor commented on petitioner's failure to testify in his own behalf?

F.

Whether the Arizona death penalty statute is unconstitutional because (1) it fails to allow the jury to take part in the sentencing determination, and (2) it fails to give the trial judge guidance on how to weigh mitigating factors against aggravating factors?

PARTIES TO THE PREVIOUS PROCEEDINGS

The parties before the Supreme Court of the State of Arizona were William Bracy, petitioner here, and the State of Arizona, the respondent here.*/

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*/ The respondent's attorney is Robert K. Corbin, Arizona Attorney General, who maintains an office at 1275 West Washington Street, Phoenix, Arizona 85007. To facilitate service upon the respondent, petitioner is serving notice of the petition for writ of certiorari upon the respondent's aforesaid attorney, as well as upon the Office of the Maricopa County Attorney, 400 East Superior Court Building, 101 West Jefferson Street, Phoenix, Arizona 85003.

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IN THE

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WILLIAM BRACY, Petitioner

-vs-

STATE OF ARIZONA, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF ARIZONA

The Petitioner, William Bracy, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the Supreme Court of the State of Arizona entered on June 10, 1985.

I.

REFERENCE TO OPINION BELOW

The reported opinion of the Supreme Court of the State of Arizona was entered on June 10, 1985. A copy of the opinion is attached hereto as Appendix A.*/ A Motion for Reconsideration was filed and was subsequently denied on August 24, 1985.

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*/ References to materials in the appendices to this petition are designated "App. ___." It should perhaps be noted that all hand-written notations on the opinion were made by either petitioner or others. Such notations are not part of the opinion.

II.

JURISDICTION

The judgment of the Supreme Court of the State of Arizona affirming petitioner's convictions and sentences was entered on June 10, 1985. A Motion for Reconsideration was denied on August 24, 1985. This Petition is filed within sixty (60) days of the judgment of the Supreme Court of the State of Arizona. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent language of the constitutional and statutory provisions involved is set forth in full in the Appendix. (App. B) They are the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and Section 13-703 of the Arizona Revised Statutes.

IV.

STATEMENT OF THE CASE

The Petitioner, William Bracy, and Joyce Lukezic were charged by indictment filed on August 27, 1981, in the Superior Court of Arizona, Maricopa County, Cause No. CR-121686, with the following offenses: Count I, CONSPIRACY TO COMMIT FIRST DEGREE MURDER, a Class 1 felony; Counts II and III, FIRST DEGREE MURDER (PREMEDITATED), Class 1 felonies; Count IV, ATTEMPTED FIRST DEGREE MURDER, a Class 2 dangerous felony; Counts V, VI and VII, ARMED KIDNAPPING, Class 2 dangerous felonies; Counts VIII, IX and X, Class 2 dangerous felonies; and Count XI, BURGLARY IN THE FIRST DEGREE, a Class 2 dangerous felony. In the conspiracy count (Count I) Robert Charles Cruz and Edward Lonzo McCall were named

as co-conspirators. Petitioner entered pleas of "NOT GUILTY" to all of the charges contained in the indictment.

On October 18, 1982, this matter proceeded to trial before a jury. On December 24, 1982, the jury returned verdicts of "GUILTY" against petitioner and his aforesaid co-defendant on all counts contained in the indictment. Thereafter, petitioner was arraigned on an allegation of two (2) prior convictions. He waived his right to a trial by jury on those allegations and on January 6, 1983, that matter was heard by the trial judge. On January 12, 1983, the trial judge returned a finding that petitioner was guilty of two (2) prior convictions. Thereafter, on February 4, 1983, a presentence hearing was held and on February 11, 1983, the trial judge returned his special verdict on Counts II and III and sentenced petitioner as follows: Count IV, 35 years to commence on February 11, 1983, with credit for 353 days of presentence incarceration; Counts V, VI and VII, 35 years on each count to run concurrently with each other but consecutively with Count IV; Counts VIII, IX and X, 35 years on each count to run concurrently on each count but consecutively to Counts V, VI and VII; Count XI, 35 years to run consecutively to Counts VIII, IX and X. On Count I, petitioner was sentenced to a life term to run consecutively to Count XI. As to Counts II and III, the petitioner was sentenced on each count to suffer the penalty of DEATH by lethal gas.

On February 16, 1983, the clerk of the court filed a notice of appeal and on March 10, 1983, counsel was appointed to represent petitioner on the appeal.

In April of 1983, petitioner filed a motion to vacate judgment pursuant to Rule 24 of the Arizona Rules of Criminal Procedure and the appeal was suspended. The trial court took testimony on that motion in July and September of 1983, and on October 20, 1983, the trial court denied the motion after making findings of fact. Thereafter, the appeal was reinstated. The Supreme Court of the State of Arizona

in an opinion filed on June 10, 1985, affirmed petitioner's convictions and sentences. (App. A) Thereafter, a motion for reconsideration was filed with the Supreme Court of the State of Arizona. On August 24, 1985, the Motion was denied.

V.

REASONS FOR GRANTING CERTIORARI

A.

THE PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE REPEATED ACTS OF INTENTIONAL AND WILLFUL MISCONDUCT BY THE GOVERNMENT ATTORNEYS AND INVESTIGATOR, ALL OF WHICH DEPRIVED PETITIONER OF HIS RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS OF LAW.

A review of the trial transcripts in this case demonstrates that the government's lawyers and one of its investigators, from the beginning to the end of this prosecution, intentionally sought to obstruct the petitioner in the preparation of his defense, to withhold critical evidence and engaged in tactics which could only have been designed to deprive petitioner of his right to a fair trial and to due process of law as those rights are guaranteed to him by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. In support of this claim, this Court's attention is directed to the acts set forth below which cover the time frame of this prosecution.

On April 22, 1982, the government lawyers opposed a request by petitioner to be provided transcripts in related proceedings. (RT of April 22, 1982 at pp. 48-49) Government counsel again opposed this request a few weeks later. The reason for the opposition was that it was the government's obligation to see that state money was spent only when the petitioner needed it. (RT of May 17, 1982 at pp. 54 and 57)

On June 18, 1982, petitioner requested the use of a county Westlaw computer for use in the preparation of his defense. The government had such a computer in its office and petitioner wanted to use the one in the county law library. Government counsel opposed this request claiming that petitioner had to show a specific need for this computer. (RT of June 18, 1982 at pp. 124-127)

On June 18, 1982, the petitioner sought access to the home where the homicides occurred. The Government lawyers opposed this request unless they could be present. They acknowledged that they wanted to be present to see what the defense was doing. (RT of June 18, 1982 at pp. 167-172)

On September 3, 1982, the petitioner and his co-defendant made a specific request for the names of all persons who had agreements with the state in this case, the agreements themselves and the amount of any funds provided for by the agreement. (RT of September 3, 1982 at pp. 4 and 15) The significance of this specific request and the date thereof will be apparent below.

On October 13, 1982, approximately two weeks before the trial was scheduled to start, petitioner was provided with a departmental report which contained extremely damaging statements allegedly made by him to another witness. The statements themselves were characterized by the trial judge as "horribly incriminating." The trial judge stated that he was satisfied that the government had this information as early as February 23, 1981. He further stated that he was gravely concerned that information of this magnitude came out two weeks before the time set for trial. (RT of October 13, 1982 at pp. 16-30)

Prior to the trial, the petitioner and his co-defendant had filed a request for a Desserault hearing regarding their identification by two government witnesses. It was agreed by all parties that in order to accommodate these witnesses, the hearings would be held after the trial had started. Nevertheless, Mr. Brownlee, one of the government lawyers, in his opening statement, told the jury that these same witnesses would positively identify petitioner and Hooper. At the hearing on the motion for mistrial, the trial court characterized this conduct as overreaching and threatened Brownlee with contempt if it happened again. (RT of November 2, 1982 at pp. 34-40)

On November 3, 1982, the day following Brownlee's opening statement, it became apparent to the Court and defense counsel that Mr. Brownlee, a few weeks prior to the start of the trial, had given an interview and posed for pictures to be used in an article in a local magazine. Statements were made concerning this case. It is apparent from the reporter's transcript that Brownlee knew that the article would probably be published around the time the trial in this case would start. (RT of November 3, 1982)

A review of the transcripts of the proceedings prior to trial demonstrates that a substantial portion of petitioner's defense was his claim that he had been misidentified by Mrs. Redmond, one of the victims. This defense was based, in part, upon statements of Mrs. Redmond contained in a police report authorized by Officer Perez. On November 3, 1982, after the trial had started and after petitioner had fashioned his defense, the government lawyers revealed to the defense and to the trial court that certain notes of Officer Perez (which had not been furnished to the defense) sharply contradicted the contents of this police report upon which petitioner had partially based his case. (RT of November 3, 1982 at pp. 253-257)

Another part of petitioner's defense was that three persons matching the initial description of the assailants given by Mrs. Redmond were arrested and later released by the police on the night of the killings. No photographs or police reports concerning these arrests were ever furnished to the defense. Nevertheless, on November 9, 1983, the government revealed the existence of photographs of these persons and attempted to use them during the trial. When government counsel persisted in his attempt to use these photos, the trial judge felt obliged to threaten him with a contempt citation. (RT of November 9, 1982 at pp. 299-307)

During the trial, Arnold Merrill, a co-conspirator and perhaps the key government witness in addition to Mrs. Redmond (See RT of Sept. 30, 1982 at p. 32) acknowledged

that while he was in custody, county attorney investigator Dan Ryan arranged for his removal from jail so he could have sex with his wife. (RT of November 18, 1982 at p. 98)

On November 22, 1982, government counsel for the first time disclosed the existence of police reports concerning the three men who were arrested and released on the night of the homicides. (RT of November 22, 1982 at pp. 18-30) These reports indicated that these three persons could not be excluded because of the time and location of their arrest - the reason originally given by the police for releasing them. (RT of November 22, 1982 at p. 19) The trial judge observed that he had been led to believe that such reports did not exist. (RT of November 22, 1982 at p. 24) He further stated that the information contained in the reports was pertinent to the case and should have been provided under Rule 15. (RT of November 22, 1982 at p. 25)

On November 23, 1982, the defense learned for the first time that another key government witness, Nina Marie Louie, had entered into a written agreement with the state pursuant to which she received lodging and money from the state totaling $878.00. (RT of November 23, 1982 at pp. 65-72)

On December 20, 1982, Daniel Ryan denied taking Merrill out of the jail for purposes of obtaining sex. (RT of December 20, 1982 at pp. 77-78)

On December 21, 1982, during his final argument to the jury, prosecutor Brownlee urged the jury to draw an adverse inference from the fact that a witness (not the petitioner or his co-defendant) had not appeared at the trial. (RT of December 21, 1982 at pp. 142-143)

In July and September of 1983, the trial court held hearings on petitioner's motion to vacate judgment. During those hearings the following matters came to light for the first time. As a result of these hearings the trial court found:

1. That Dan Ryan, county attorney investigator, prior to the trial of this matter, advanced monies to Merrill's wife for car payments on two occasions which

in each instance was an amount of $414.00. That only partial reimbursement was made. Further, that these payments were a distinct benefit to the Merrills.

2. That Mrs. Merrill received approximately $3,000.00 from the county attorney's protected witness program. Evidence at the hearing showed that all of this assistance was received prior to trial.

3. That Merrill made approximately 22 long distance calls from the county attorney's office, some of which were with the knowledge and consent of Dan Ryan. See minute order of October 20, 1983.

The foregoing matters do not constitute all of the acts of misconduct of the prosecution team in this case. Space limitations simply does not allow a complete exposition of this offensive behavior. These acts are set forth to demonstrate that from start to finish the prosecution team sought to interfere with and obstruct the preparation and presentation of petitioner's defense. Unquestionably, they were successful.

Although many of the matters set forth above, taken by themselves, would not justify the granting of a mistrial, all of the matters, taken in the aggregate, compel the conclusion that the trial court should have mistried the case rather than submitting it to a jury on account of denial of a fair trial. By the end of the trial, the intent and purpose of the government lawyers and their investigator, Ryan, was crystal clear: They were above the law. Bracy and Hooper were guilty as hell of the most heinous crime in Maricopa County in living memory and this prosecution team would literally stop at nothing to convict them. And they didn't.

After the trial judge entered his order denying the motion to vacate judgment he made the following part of his order:

> The Court further determines that a cavalier, almost holier-than-thou attitude existed on the part of some of the prosecution team as evidenced

> by the overreaching, "I didn't think it mattered" blase at times, disinterested, its-none-of-your-business attitudes taken at various points during these entire proceedings.
>
> These attitudes hampered the smooth processing of these matters during all stages and at all times caused unnecessary antagonisms between the prosecution and defense teams.
>
> The Court is disturbed that all law enforcement supervisors called in the hearings on these motions for vacation of judgment showed little or no interest in reviewing and analyzing allegations of violations of Maricopa County Jail policies written or unwritten, well established standard methods for handling persons in custody while in a law enforcement officer's care, custody and control, as well as other questionable conduct.
>
> The Court is further disturbed by the fact that at every discovery and evidentiary gathering effort undertaken by the defense teams in these matters, new revelations of benefits bestowed upon Mr. Merrill or questionable conduct by a member or members of the prosecution team are revealed and require pursuit. Minute order of October 20, 1983.

Petitioner submits that the Supreme Court of the State of Arizona has erred in failing to reverse his convictions for prosecutorial misconduct. Petitioner submits that said Court has failed to appreciate the impact on the defense case which was generated by the withholding of certain evidence. Particular reference is made to the rough notes of Officer Perez and the police reports concerning the three persons arrested by the Phoenix police on the night of the killings.

Concerning the notes of Officer Perez, petitioner concedes that these items were inculpatory and thus the analysis of United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), would seem to apply insofar as a Brady (Brady v. Maryland (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215) claim might exist. However, the Opinion of the Supreme Court of the State of Arizona fails to take into account the impact this non-disclosure had on the preparation and presentation

of the defense. A substantial portion of the defense case was predicated upon a claim of misidentification of the petitioner by the surviving victim, Mrs. Redmond. Surely this was no secret to the prosecution. Had the defense known that Officer Perez's rough notes contradicted the contents of his police report, it is fair to assume that the petitioner would have changed his defense strategy. To put it plainly, the prosecution, by withholding this evidence, led the defense to believe that a strong misidentification defense existed when, in fact, it did not. The underlying principle which the aforesaid Court overlooks in its Opinion is that any defendant is entitled to full disclosure so that he may fairly evaluate the evidence and available defenses in order to prepare his defense. The withholding of Officer Perez's notes substantially obstructed that defense function and required a change on strategy after the trial had begun. Considering the seriousness of the charges and the massive amount of information to be investigated and weighed, forcing a change of strategy in the middle of trial substantially deprived petitioner of his right to a fair trial.

With regard to the withholding of the police reports concerning the arrest of three men on the night of the killings who were initially thought to be possible suspects, petitioner submits that such Court's reliance on State v. Jessen, 130 Ariz. 1, 633 P.2d 410 (1981) is misplaced. Jessen involved a failure to disclose a variation between the statement of a witness, recorded in a police report and a statement later given by the same witness to the prosecutor. The variation was later disclosed at trial. Based on these facts, the Supreme Court of the State of Arizona held that when previously undisclosed exculpatory evidence is revealed at trial and presented to the jury, there is no Brady violation. Jessen at p. 413. In this case, the evidence which was not disclosed was substantially more than a favorable variation in the testimony of one witness. What was concealed was substantial evidence which, at least, facially suggested that persons other than petitioner and his co-defendant were responsible for

the killings. Comparing the concealed evidence in this case to that which was in issue in Jessen is to compare a gnat to an elephant. Obviously, both are animals, but the similarity ends there. This case took months to investigate and prepare and many weeks to try. Had the information been provided to the defense, there simply is no telling what could have been done with it. And that is precisely what is wrong with the aforesaid Court's analysis of this claim. Neither such Court or anyone else is able to state what could have been done with the concealed information had it been provided in a timely manner. It is impossible to assess the potential impact of this evidence since the petitioner and his counsel were never given the opportunity to investigate and further develop the information. The aforesaid Court's Opinion seems to reward the government for its own misconduct by assuming: (1) the scope and extent of the concealed evidence was only that which was revealed at trial and that no further information or evidence favorable to petitioner could be developed and (2) the use to which the concealed evidence was put at trial is the only use which could have been made of the evidence. The fact of the matter is that no one knows where or to what this concealed information could have led or what other uses could have been made of it. The reason no one knows is that the government broke the rules and failed to disclose the information. Not only is the aforesaid Court's reliance on Jessen misplaced, but its Opinion appears to be inconsistent with this Court's holdings in Brady v. Maryland, supra, and United States v. Agurs, supra. This Court's overriding concern in those cases was the defendant's right to a fair trial. One of the most basic elements of fairness in a criminal trial is that available evidence tending to show innocence, as well as that tending to show guilt, be fully aired before the jury; more particularly, it is that the State in its zeal to convict a defendant not suppress evidence that might exonerate him. See Moore v. Illinois, 408 U.S. 786, 810, 92 S.Ct. 2562, 2575, 33 L.Ed.2d 706 (1972) (opinion of Marshall, J.).

No interest of the State is served, and no duty of the prosecutor advanced, by the suppression of evidence favorable to the defendant. On the contrary, the prosecutor fulfills his most basic responsibility when he fully airs all the relevant evidence at his command. This case involve deliberate prosecutorial misconduct. There is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction had such evidence been timely disclosed. The right of the petitioner, under the Fifth, Sixth and Fourteenth Amendments, to a fair trial was violated by the deliberate prosecutorial misconduct of suppression of evidence affecting the truth-seeking process. The Superior Court of Maricopa County erred in not granting a mistrial, and the Supreme Court of the State of Arizona erred in affirming petitioner's convictions and sentences. For these reasons it is requested that this Honorable Court grant the Petition for Writ of Certiorari, reverse the convictions and sentences of the petitioner, and remand the cause for a new trial.

B.

THE ADMISSION OF THE IDENTIFICATION TESTIMONY AT PETITIONER'S TRIAL DEPRIVED HIM OF DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.

In Foster v. California, 394 U.S. 440, 442, 89 S.Ct. 1127, 1128, 22 L.Ed.2d 402 (1969), this Court found the identification procedures to be violative of due process. There, the witness failed to identify Foster the first time he confronted him, despite a suggestive lineup. The police then arranged a showup, at which the witness could make only a tentative identification. Ultimately, at yet another confrontation, this time a lineup, the witness was able to muster a definite identification. This Court held all of the identifications inadmissible, observing that the identifications were "all but inevitable" under the circumstances. Id., at 443, 89 S.Ct., at 1129. It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in Foster. Like Foster there exist in the present case an intolerable risk of misidentification.

After recovering from her injuries, the surviving victim, Mrs. Redmond, was transported to Chicago for the purpose of viewing a lineup. Prior to being shown the lineups, Mrs. Redmond was told that someone had been arrested in Chicago and that she was going to look at some people. (RT of November 30, 1982 at p. 59)

Petitioner and his co-defendant were displayed to Mrs. Redmond in separate lineups. Mrs. Redmond claimed to have identified petitioner and his co-defendant after reviewing these lineups.

Prior to the trial of this matter, petitioner and his co-defendant filed motions to suppress their pretrial identification by Mrs. Redmond as unduly suggestive. The evidence adduced at the hearing on these motions and later, during

the trial, showed that Mrs. Redmond, shortly after the incident, stated that one of the negro suspects involved in the killings was light complected. (RT of December 20, 1982 at pp. 130-131) On another occasion, Mrs. Redmond stated that petitioner was lighter than most of the black people she had ever seen in her life. (RT of November 30, 1982 at p. 84)

At the hearing on petitioner's motion, evidence was adduced that petitioner was lighter than anyone else in the lineup (RT of August 27, 1982 at p. 28), was the only one in the lineup with a short sleeve shirt (in Chicago in February of 1981) (RT of August 27, 1982 at p. 50) and was the only person in the lineup with a tatoo (RT of August 27, 1982 at p. 51). Despite these facts (and despite the fact that it was clear that petitioner could have been provided with a long sleeve shirt before the lineup) (RT of August 27, 1982 at p. 104) the trial Court refused to find the pretrial identification unduly suggestive or that, under all the circumstances, the suggestive procedure gave rise to a substantial likelihood of misidentification. The Supreme Court of the State of Arizona assumed, without deciding, that the lineup procedure was unduly suggestive, but found the identification reliable under the five (5) factors stated in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). They are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Id., at 199, 93 S.Ct., at 382. Petitioner here asserts that the Supreme Court of the State of Arizona erred in so finding.

First, Mrs. Redmond did not have ample opportunity to observe the intruders under conditions favoring a reliable identification. Mrs. Redmond testified that after she first encountered petitioner in the laundry room, he led her through her

house at gunpoint speaking to her several times. She indicated that she was frightened and feared for her life. While Mrs. Redmond claimed that during this period she had no difficulty seeing petitioner's face or body, and further claimed that she also got a good look at him in her well-lighted bedroom, she gave a description of one of her assailants as merely light complected. Considering the facts that Mrs. Redmond was frightened, and that she focused her attention on one of her assailants' complection, she did not have ample opportunity to observe all of her assailants under conditions favoring a reliable identification.

During the incident, Mrs. Redmond did not have a high degree of attention. The record reflects that she was very frightened and, while she paid attention to what her assailants were doing, her attention was not focused on the faces of all of her assailants.

As the Supreme Court of the State of Arizona notes in its Opinion, the accuracy of Mrs. Redmond's description was hotly contested at trial, with the defense arguing that Mrs. Redmond's first description of her assailants indicated that three black men, two of whom were masked, were the murderers. Mrs. Redmond said all three men were black and then said "no, one was white." Some accounts indicate that she stated that one or two of the assailants wore masks and other testimony in the record shows that Mrs. Redmond never mentioned masks following the crime. Her descriptions of the assailants were not particularly detailed. Petitioner submits that examination of the totality of the circumstances regarding this factor leads to the conclusion that the accuracy of the witness' prior description was minimal.

Mrs. Redmond did not display a good level of certainty at the lineup. When she first viewed the lineup containing petitioner, she did not even identify him. Instead, she left the room for a considerable period of time and then returned. Afterwards, she requested that the first lineup be reassembled, at which time she identified petitioner.

Mrs. Redmond indicated through her testimony that she had picked out petitioner in her mind during the first lineup because he was light complected, and that she wanted a second look at him to make sure of his height. When she again saw petitioner she said she was positive that he was one of the assailants. Mrs. Redmond's initial hesitancy does not demonstrate a good level of certainty.

With regard to the time between the crime and the confrontation, Mrs. Redmond's identification of petitioner came fifty-three days after the crime. Thus, there was the passage of many weeks between the crime and the confrontation. Mrs. Redmond's identification of petitioner fifty-three days after the crime was unreliable under the facts and circumstances of this case.

Petitioner submits that these indicators of Mrs. Redmond's ability to make an accurate identification are outweighed by the corrupting effect of the challenged identification itself. Petitioner further submits that under all the circumstances of this case there exist a very substantial likelihood of misidentification, and that, therefore, the Superior Court of Maricopa County erred in admitting evidence of Mrs. Redmond's pretrial identification of petitioner as well as in-court identification, and the Supreme Court of the State of Arizona erred in affirming petitioner's convictions and sentences. It is therefore requested that this Honorable Court grant the Petition for Certiorari, reverse the convictions and sentences of the petitioner, and remand the cause for further prceedings.

C.

THE REFUSAL OF THE TRIAL COURT TO PERMIT THE CROSS-EXAMINATION OF INVESTIGATOR RYAN ON HIS PENDING CONTEMPT CHARGES DEPRIVED PETITIONER OF HIS RIGHT TO CONFRONTATION IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

Prior to the commencement of the trial of this matter, County Attorney Investigator Dan Ryan was cited for contempt by another division of the Maricopa County Superior Court for his conduct in and prior to the trial of co-conspirator Lukazic. Prior to calling Ryan as a rebuttal witness in this case, the government attorneys sought and received an order of the trial judge that Ryan could not be cross-examined on the pending contempt citation. Thereafter, when Ryan was being questioned on direct by the government's lawyer, he was asked about the facts and circumstances which comprised the pending contempt citations against him. He denied engaging in this conduct. (RT of December 20, 1982 at pp. 27-72) Thereafter, petitioner and his co-defendant sought leave of the trial court to question Ryan concerning his pending contempt citation despite the previous order of the court. (RT of December 20, 1982 at pp. 133-135) This request was denied.

The rationale of petitioner's argument was that the government itself had made the pending contempt charge relevant and appropriate for cross-examination by asking Ryan about the substance of the pending contempt charges and giving him a chance to deny them. The defense theory was that Ryan had a compelling, obvious bias and reason for giving the answers he gave to the questions posed by the prosecutor:

> Mr. Woods: "The jury should know that if Dan answered anything but no at this point he would be admitting to the charges which are felonies against him."
> (RT of Dec. 20, 1982 at p. 135)

Petitioner respectfully submits that the refusal of the trial court to allow petitioner and his co-defendant to cross-examine Ryan on his pending contempt citation

deprived petitioner of his right to confront and cross-examine the witness against him as that right is guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

In Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), this Court held that the Sixth Amendment's right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the States by the Fourteenth Amendment. Confrontation means more than being allowed to confront the witness physically. "'Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination.'" Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). Moreover, a witness' bias or self-interest may be shown by proving that the witness is under indictment and that the prosecution is responsible for prosecuting that indictment. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

In Davis v. Alaska, supra, this Court stated:

> "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959)." Id., at 316, 94 S.Ct., at 1110.

The test for whether the trial court has abused its discretion in denying cross-examination is whether the jury is otherwise in possession of sufficient information upon which to make a discriminating appraisal of the subject matter at issue. When the refused cross-examination relates to impeachment evidence, as in this case, a court must see whether the jury had sufficient information to appraise the bias and motives of the witness. Skinner v. Cardwell, 564 F.2d 1381, 1389 (9th Cir. 1977).

The pendency of Ryan's contempt citation obviously affected the answers he gave to the prosecutor's questions in this case. The trial court's ruling that the matter was irrelevant and inadmissible effectively emasculated petitioner's right to cross-examine witness Ryan and was error. Likewise, the failure of the Supreme Court of the State of Arizona to find an unreasonable limitation of the cross-examination right was error. In its Opinion such Court indicates that it did not find an unreasonable limitation of the cross-examination right because, "(f)irst, the County Attorney prosecuting the instant case was not involved in prosecuting Mr. Ryan for contempt;" and, "(s)econd, the jury had before it ample evidence showing Mr. Ryan's bias and self-interest." (Opinion, p. 25) Petitioner submits that both of such reasons are unsupported by the record or are either inaccurate or insufficient. For these reasons it is requested that this Honorable Court grant the Petition for Writ of Certiorari, reverse the convictions and sentences of the petitioner, and remand the cause for a new trial.

D.

THE TRIAL COURT'S ADMISSION INTO EVIDENCE OF CERTAIN GRUESOME PHOTOGRAPHS OF THE VICTIMS AND THE CRIME SCENE WAS AN ABUSE OF DISCRETION AND DEPRIVED THE PETITIONER OF HIS RIGHT TO A FAIR TRIAL IN VIOLATION OF THE FOURTEENTH AMENDMENT.

In the instant case, the cause and manner of death was never at issue. Petitioner and his co-defendant stipulated to the cause of death. (RT of November 4, 1982 at p. 24) The uncontested nature of these facts is further demonstrated by the testimony of Detective Martinson describing the location and condition of the bodies. There was virtually no cross-examination of Martinson on these issues. (See RT of November 4, 8 and 9, 1982 at pp. 136 et seq.) The testimony of the medical examiner also proves the point. Cross-examination of this witness consisted of 1½ pages of reporter's transcript, a total of seven questions, none of which challenged the government's theory regarding the cause and manner of death. Nevertheless, the government insisted upon the introduction of a series of gruesome photographs showing the horrible injuries of the victims and copious amounts of blood. These exhibits were: 52, 53, 55, 57, 58, 59, 61, 64, 66, 67, 73, 76, 77, 79, 80, 81-84, 86, 88 and 89.

During the trial, petitioner objected to the admission of these pictures on the basis that they were gruesome and that the probative value was substantially outweighed by the danger of unfair prejudice. (RT of November 4, 8 and 9, 1982 at pp. 32 et seq.) A review of the photographs demonstrates the point better than any argument which could be set forth here. The photographs were both gruesome and horrible. They were also irrelevant, unnecessary and prejudical. The photographs were not used as an aid to the jury but rather for shock value.

In his brief filed before the Supreme Court of the State of Arizona, petitioner acknowledged that the admission of photographs of this type was largely a matter of discretion for the trial court and that absent a showing of an abuse of that discretion,

the ruling of the trial court should not be disturbed. Petitioner cited the case of State v. Makal, 104 Ariz. 476, 455 P.2d 450 (1969), where the Supreme Court of the State of Arizona stated:

> "Photographs may be material to establish the cause or manner of death or may have other probative value and may be admitted or excluded within the trial court's sound discretion. * * * (citation omitted) * * * Where as here there was substantially no contraversy concerning the commission of the offenses, there was no significant reason for their admission into evidence. The photographs were highly inflamatory, without any particular saving purpose, and could only have tended to prejudice the defendant in the minds of the jurors." Makal, at p. 452.

Petitioner also cited the cases of State v. Steele, 120 Ariz. 462, 586 P.2d 1274 (1978), where the Supreme Court of the State of Arizona stated it will not hesitate to reverse when it is satisfied that the sole purpose for the introduction of gruesome evidence was to prejudice the jury; and State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983), where such Court considered the precise issue presented here and held the admission of the photographs to be error in light of the fact that they were extremely inflammatory and did not tend to prove or disprove any issue which was actually being contested between the parties. See Chapple, at pp. 1215-1216. Here, however, such Court did not so hold. Instead, it found that their probative value outweighed their prejudicial effect, and that the trial court did not abuse its discretion in admitting the photographs. Petitioner submits that the Supreme Court of the State of Arizona erred.

Any fair-minded review of the record in this case will demonstrate that the gruesome and highly inflammatory photographs referred to above were offered for only one purpose: to prejudice the jury against petitioner and his co-defendant. They added nothing to assist the jury in resolving any issue contested by the parties. The admission of the photographs clearly constituted a gross abuse of discretion

(accord Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 823 (1971)(elements of "abuse of discretion" test)) and deprived petitioner of his right to a fair trial as that right is guaranteed by the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the State of Arizona erred in finding no error in the admission of such photographs. For these reasons petitioner request that this Honorable Court grant the Petition for Writ of Certiorari, reverse his convictions and sentences, and remand the cause for a new trial.

E.

THE PROSECUTOR COMMENTED ON THE FAILURE OF PETITIONER TO TESTIFY IN VIOLATION OF HIS RIGHT TO SILENCE AS GUARANTEED TO HIM PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS.

During the government's final argument to the jury, prosecutor Brownlee made the following statement:

> "Mr. Woods told you in his opening statement that Cruz and Merrill tried to get Bracy and Hooper involved in the South Phoenix drug deal and Bracy and Hooper said no, take a hike. You didn't hear any evidence to that effect." (RT of Dec. 21, 1982 at p. 152, emphasis added.)

Both counsel immediately objected to this statement and moved for a mistrial. (RT of December 21, 1982 at p. 153) The prosecutor attempted to justify this comment on the basis that Hooper's lawyer (Mr. Woods) had stated in his opening statement that he would prove this. The trial judge refused to grant the mistrial and merely instructed the jury to disregard the statement. Lost in the shuffle was the fact that neither petitioner or his counsel had made this statement.

It is well settled that a prosecutor may not comment on a defendant's invocation of his right to silence in a criminal trial. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Such a comment violates a defendant's right to silence guaranteed to him by the Fifth and Fourteenth Amendments to the Constitution of the United States. Prosecutorial comment mandates reversal "where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could have supported acquittal." Anderson v. Nelson, 390 U.S. 523, 88 S.Ct. 1133, 20 L.Ed.2d 81 (1968) (per curiam).

In the instant case, the prosecutor deliberately made reference to petitioner's silence as indicated above. The comment was not invited by either petitioner or his counsel. While the record does reflect that the statement in question was an isolated one during the course of lengthy final arguments, it is clear that the prosecutor sought through such statement to stress petitioner's silence as evidence of guilt and that such statement was not the only incident of deliberate misconduct on the part of the prosecution. Clearly, "the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." United States v. Soulard, 730 F.2d 1292, 1306 (9th Cir. 1984). Under these circumstances, the prosecutor's comment on the failure of petitioner to testify prejudiced petitioner considerably and deprived him of his right to silence as guaranteed to him by the Fifth and Fourteenth Amendments to the Constitution of the United States. The Supreme Court of the State of Arizona erred in holding that no violation occurred because "(t)he prosecutor's statement reflected the state's position that defendant failed to produce exculpatory evidence regarding a certain issue," and because "(i)t (the comment) was not phrased to call attention to defendant's own failure to testify, nor does it appear from the record that defendant was the only one who could explain or contradict the state's evidence." It is therefore requested that this Honorable Court grant the Petition for Certiorari, reverse the convictions and sentences of the petitioner, and remand the cause for further proceedings.

F.

THE PROVISIONS OF A.R.S. §13-703 VIOLATE PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DENIES PETITIONER THE RIGHT TO HAVE A JURY PASS ON THE FACTUAL QUESTIONS WHICH MIGHT LEAD TO THE IMPOSITION OF THE DEATH PENALTY.

The procedure set forth in the provisions of A.R.S. §13-703 for the assessment of the death penalty leaves all of the decisions upon which the imposition of the penalty may be predicated in the hands of the trial judge. Petitioner submits that this procedure denied him his right to a trial by jury in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States. In its special verdict, the trial judge found as aggravating circumstances that petitioner created a grave risk of death to Marilyn Redmond, that he committed the killings for the receipt or in the expectation of the receipt of pecuniary value and that the killings were accomplished in an especially heinous, cruel and depraved manner. Each of these factors involves a factual determination about the nature of the crime rather than a judgment concerning the nature of the petitioner or his background. Therefore, petitioner relies upon State v. Quinn, 50 Or.App. 383, 623 P.2d 630 (1981), where the Court said, in striking down the Oregon statute:

> ". . . the facts which constitute the crime are for the jury and those which characterize the defendant are for the judge." Quinn, supra, at p. 643.

For these reasons it is requested that this Honorable Court grant the Petition for Certiorari, reverse the judgment upholding the death penalty, and remand for further proceedings.

G.

THE PROVISIONS OF A.R.S. §13-703 VIOLATE PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT GIVES THE TRIAL COURT NO GUIDANCE AS TO WHAT ARE MITIGATING FACTORS AND NO GUIDANCE AS TO THE MANNER IN WHICH AGGRAVATING FACTORS ARE TO BE WEIGHED AGAINST MITIGATING FACTORS.

The petitioner submits that the Arizona death penalty statute, A.R.S. §13-703, is unconstitutional under the Eighth and Fourteenth Amendments to the Constitution of the United States as interpreted in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), in the following respects:

1. The open-ended language of A.R.S. §13-703(G) gives the trial court no guidance as to what are mitigating factors. Under the statute anything can be a mitigating factor. A statute which leaves a judge free to regard anything as a mitigating factor necessarily leaves him free to disregard anything as a mitigating factor. The result is that the death penalty is imposed in Arizona in just as arbitrary and capricious a manner as the statute struck down in Furman v. Georgia, supra.

2. Even if the trial judge finds one or more mitigating circumstances, if he finds at least one aggravating factor he is free to impose a death penalty by simply saying the mitigating factor(s) are not ". . . sufficiently substantial to call for leniency." A.R.S. §13-703(E). The statute gives the judge no guidance in how to weigh aggravating against mitigating circumstances. The result is a totally subjective determination that one man shall live and the other shall die. A.R.S. §13-703 appears to give a judge guidance so that this decision will not be arbitrary. Upon analysis, it provides none at all.

For these reasons it is requested that this Honorable Court grant the Petition for Certiorari, reverse the death penalty of the petitioner, and remand the cause for

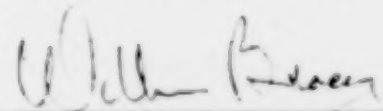
further proceedings.

VI.

CONCLUSION

For the reasons stated above, petitioner respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari to the Supreme Court of the State of Arizona.

Respectfully submitted,



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